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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 750

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, AFL-CIO, ET AL., PETITIONERS

v.

FLORIDA EAST COAST RAILWAY COMPANY

No. 782

UNITED STATES OF AMERICA, PETITIONER

v.

FLORIDA EAST COAST RAILWAY COMPANY

No. 783

FLORIDA EAST COAST RAILWAY COMPANY, CROSS-PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (R. 903) is reported at 348 F. 2d 682. The findings of fact and

conclusions of law of the district court (R. 180–189) are unofficially reported at 57 LRRM 2618. The preliminary injunction issued by the district court on October 30, 1964 (R. 189–191), and the order issued by the district court on December 3, 1964 (R. 223–225) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1965 (R. 911–912). By orders entered on October 15, 1965, and November 18, 1965, Mr. Justice Black extended the time for filing a petition for a writ of certiorari to and including November 29, 1965. The petition in No. 750 was filed on November 18, 1965, and the petitions in Nos. 782 and 783 were filed on November 29, 1965. All three petitions were granted on January 24, 1966 (R. 913–914; 382 U. S. 1008). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Section 2, Seventh, of the Railway Labor Act (45 U.S.C. 152, Seventh) provides that "[n]o carrier * * * shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title [requiring notice to the bargaining representatives of the employees concerned, negotiation with those representatives, and access to mediation and arbitration before such changes are made]." The questions presented are:

1. Whether this prohibition continues to be generally applicable during a lawful strike against the carrier;

2. Whether, if the prohibition continues to be applicable during a strike, the court of appeals correctly held that the Act nevertheless permits "reasonably necessary" changes during a strike; and

3. Whether the United States has standing to maintain an action to enjoin violations of Section 2, Seventh.

STATUTES INVOLVED

The relevant provisions of the Railway Labor Act, as amended, 44 Stat. 577 (45 U.S.C. 151 *et seq.*), are set forth in Appendix A to this brief, *infra*, pp. 56–63.

STATEMENT

I

BACKGROUND

This case arises out of a strike on the Florida East Coast Railway (FEC) which has become the longest strike in American railroad history. The strike had its genesis in a dispute between the railroad and its nonoperating unions which arose in September, 1961. At that time, eleven non-operating unions[1] served notice under Section 6 of the Railway Labor Act (45 U.S.C. 156, *infra*, p. 62) upon virtually all Class I

[1] "Non-operating" unions are those representing employees who do not actually operate the trains, such as machinists, telegraphers, electrical workers and clerks. "Operating" unions are those representing employees such as trainmen, engineers and firemen. The non-operating unions were intervenors below and are the petitioners in No. 750.

railroads in the United States—including FEC—of their desire to revise existing agreements to provide for a general 25-cent-per-hour wage increase and a requirement of six-months advance notice of impending layoffs and abolition of job positions. The carriers—including FEC—counterproposed general wage cuts and elimination of all provisions requiring more than 24 hours notice of impending layoffs or job abolitions. The dispute thus created underwent negotiation and mediation as required by the provisions of the Railway Labor Act. (See Sections 6 and 5, First, of the Act, 45 U.S.C. 156, 155, First, *infra,* pp. 61–62). However, no settlement was reached in this manner.

Thereafter, a Presidential Emergency Board was created under Section 10 of the Railway Labor Act (45 U.S.C. 160, *infra,* p. 63) to recommend a settlement of the industry-wide dispute. After extensive hearings, the Board recommended a general pay increase of about 10 cents per hour and a requirement of at least 5 days' notice before job abolitions. In June, 1962, this settlement was accepted by every Class I railroad in the country except FEC.

Upon FEC's rejection of the national settlement, further mediation was invoked under the Railway Labor Act. Again no settlement was reached, and both FEC and the unions involved refused voluntary arbitration under Section 5, First, of the Act (45 U.S.C. 155, First, infra, p. 61). The strike of the non-operating unions which resulted in this litigation occurred on January 23, 1963, after a final round of negotiations also proved unsuccessful.[2]

[2] This account of the events leading up to the strike is taken from the report of a second Emergency Board created by the

When the non-operating unions struck, most operating employees refused to cross the picket lines. The railroad shut down for a short period but, on February 3, 1963, it resumed operations by employing supervisory personnel and replacements to fill the jobs of the strikers and those operating employees who would not cross the picket lines. In thus reinstating service, FEC disregarded the rates of pay, rules and working conditions set forth in its existing collective bargaining agreements with the unions representing its employees. As the district court subsequently found, replacements for striking employees at this time "made individual agreements with FEC concerning their rates of pay, rules and working conditions, on terms substantially different from the collective bargaining agreements in force for the relevant crafts or classes" (R. 182). This sweeping unilateral displacement of existing agreements, contrary to the express terms of Section 2, Seventh of the Act, essentially constitutes the basis of the complaint against FEC in this case.

On September 1, 1963, the broad changes in wages, rules and working conditions already effected unilaterally by FEC were formally promulgated in a document entitled "Conditions of Employment" (Exh. Vol. 4–35), which all new employees were subsequently required to sign before going to work (Exh. Vol. 75). Thereafter, on September 24, 1963, FEC served notices on all non-operating unions pursuant to Section 6 of the Railway Labor Act, proposing formally to abolish all existing collective bargaining

President to attempt to settle the FEC strike (Exh. Vol. 451–490).

agreements—which FEC had not complied with since reinstituting service—and permanently to substitute a slightly expanded version of the "Conditions of Employment," the so-called "Uniform Working Agreement" (Exh. Vol. 402–440; R. 313–321).[3] This document, like the "Conditions of Employment," incorporated sweeping departures from the rates of pay, rules and working conditions set forth in the existing collective bargaining agreements. For example, FEC proposed that it exercise exclusive control over discipline, promotions, job assignments and work rules and that seniority lists be broadly reorganized to abolish traditional craft lines.[4]

On October 18, 1963, FEC met with the unions to discuss this proposal pursuant to the requirements of the Act, but the meeting terminated when FEC insisted upon the presence of a court reporter. The unions then took the next statutory step by invoking the mediation services of the National Mediation

[3] On July 31, 1963, FEC had also served a statutory notice on the unions, proposing to amend the existing agreements by abolishing the union shop, effective September 1, 1963 (Exh. Vol. 376–379). A conference between FEC and the unions on this proposal broke up for the same reason as the subsequent conference on the comprehensive "Uniform Working Agreement," namely, FEC's insistence on the presence of a court reporter. Although the unions invoked the services of the National Mediation Board (Exh. Vol. 386–387), and the Board rejected FEC's contention that it was free to implement this proposal because the unions had failed to bargain (Exh. Vol. 394–395), FEC nonetheless unilaterally abolished the union shop provisions thereafter (Exh. Vol. 395–396).

[4] See Exh. Vol. 459.

Board relative to the proposed changes, but FEC insisted that the unions had forfeited mediation by terminating the prior conference (Exh. Vol. 440–441). The unions, in the interim, changed their previous position and, on April 3, May 17 and October 14, 1963, acceded to requests by both the Secretary of Labor and the National Mediation Board to submit the underlying wage and notice dispute to arbitration. FEC, however, continued to refuse arbitration (Exh. Vol. 459, 461).

Thereafter, on October 30, FEC unilaterally replaced the "Conditions of Employment" with the "Uniform Working Agreement," and refused to rescind this action when, on the following day, the National Mediation Board rejected the carrier's legal contention and docketed the dispute for mediation (Exh. Vol. 442–447).[5] After October 30, 1963, employees hired by FEC were required to sign copies of the "Uniform Working Agreement" (R. 283–284) as they had previously been required to sign the "Conditions of Employment." The mediation process in

[5] On November 9, 1963, after receiving the report of a Federal Board of Inquiry, composed of representatives from the Departments of Defense and Labor and the National Aeronautics and Space Administration, that "this labor dispute is currently and potentially detrimental to our Nation's defense and space efforts," and upon the recommendation of the National Mediation Board, the President created an Emergency Board to inquire into the FEC strike (Exh. Vol. 460–461). On December 23, 1963, this Board recommended that the railroad reinstate striking employees, accept the national settlement of the wage dispute prospectively, but not retroactively, and that other proposals of both parties should be withdrawn (Exh. Vol. 489–490).

regard to these permanent[6] changes has never been terminated; and as we have noted, the changes were originally made in the absence of any negotiation with the unions.

From October 30, 1963, until November 14, 1964, when the district court's injunction in this case (R. 189–191) took effect, FEC operated under the rates of pay, rules and working conditions set forth in the "Uniform Working Agreement." FEC enjoyed a substantial increase in its operating profit during this strike period.[7] By October, 1963, FEC was carrying approximately 95 per cent of the volume of carload freight which it had carried prior to the strike, and since that time it has been carrying carload freight at a volume equal to or exceeding pre-strike levels (R. 182, 363). FEC did not reinstate its passenger or less-than-carload freight services, which had been less profitable than its carload freight service (Exh. Vol. 459–460). FEC's operations during this period were carried on with about 650 employees as opposed to the approximately 2000 employees working in comparable pre-strike periods (R. 365–366).[8]

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[6] FEC has contended in these proceedings that the "Conditions of Employment" were meant to be operative only for the duration of the strike (Petition, No. 783, p. 5, n. 3). The court of appeals characterized this contention as "plainly specious" (*Florida East Coast Ry. Co.* v. *Brotherhood of R. Trainmen*, 336 F. 2d 172, 180 (C.A. 5), certiorari denied, 379 U.S. 990).

[7] This fact is revealed by FEC's annual and quarterly reports to the Interstate Commerce Commission and by FEC's 1964 Annual Report to Shareholders, p. 20.

[8] According to the Florida Public Utilities Commission, FEC's reinstatement of freight service was, in addition, marked by a disregard of standards of safe operation and a neglect of the maintenance of its right-of-way, structures, switches, signals and rolling stock (Exh. Vol. 459–460).

II

THE PRESENT SUIT AND THE *TRAINMEN'S* CASE

The United States instituted the present suit on April 30, 1964. In its complaint it alleged that FEC had violated the Railway Labor Act through its unilateral implementation, as to its non-operating employees, of changes in rates of pay, rules, and working conditions as embodied in the "Conditions of Employment" and the "Uniform Working Agreement." The United States requested that FEC be enjoined from continuing to implement such changes (R. 13–16). The non-operating unions of FEC were granted leave to intervene as plaintiffs.

Hearings were held before the district court in May, 1964.[9] Chief Judge Simpson delayed his deci-

[9] Railroad officials testified that FEC was continuing its program of recruiting replacements for strikers, but was only recruiting sufficient personnel to satisfy the requirements of the "Uniform Working Agreement," and not to meet the requirements of the negotiated collective bargaining agreements (R. 366). Before a Federal Inquiry Board convened on October 1, 1963, Winfred L. Thornton, President of FEC, stated that FEC anticipated hiring many fewer personnel than it employed prior to the strike "because we've been able to eliminate to a very large degree the featherbedding that's been in the railroad industry" (R. 366). He added that FEC, although faced with a strike, was raising its educational and physical requirements for new employees (R. 364–365). R. W. Wyckoff, Vice President of FEC, also claimed that "we were actually working under the rules that were negotiated" in the existing agreements, but merely "were deviating from those rules because of the shortage of manpower" (R. 293). Although FEC had sweepingly changed existing terms of employment through its unilateral implementation of the "Conditions of Employment," Mr. Wyckoff said that the Conditions of Employment never went into "effect" because "you can't change the rules that are

sion, however, because of the pendency before the court of appeals of *Florida East Coast Ry. Co.* v. *Brotherhood of R. Trainmen,* 336 F. 2d 172 (C.A. 5), certiorari denied, 379 U.S. 990, a parallel injunctive suit brought against FEC by a union representing operating employees and similarly complaining of FEC's unilateral institution of new wages, rules and working conditions.[10] On August 18, 1964, the Fifth Circuit ruled in the *Trainmen's* case that FEC had violated the Railway Labor Act by its wholesale unilateral abrogation of existing collective bargaining agreements. The court of appeals also ruled, however, that FEC could unilaterally institute such changes in its existing agreements as the district court found to be "reasonably necessary to effectuate its right to continue to run its railroad under the strike conditions" (336 F. 2d at 182). The court remanded the case to the district court to determine what, if any, departures from existing agreements met that test (336 F. 2d at 182–183). This court denied the union's petition for a writ of certiorari (379

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in effect unless you go through the process of the Railway Labor Act" (R. 294–295).

Mr. Wyckoff also stated that FEC was not faced with an emergency situation with respect to freight service (R. 312), and that it could have operated in full compliance with its agreements, albeit on a very reduced basis (R. 330). Specifically, he estimated that with FEC's present work force, it would have to reduce operations about 50 per cent to comply fully with its agreements, and would need to hire 600 additional employees to comply fully with the agreements, and maintain full freight service (R. 353–354).

[10] On March 2, 1964, Judge Simpson had issued a preliminary injunction in the *Trainmen's* case ordering FEC to reinstitute and maintain the rates of pay, rules, and working conditions

U.S. 990).[11] The district court subesquently entered injunctions in both this case and the *Trainmen's* case (R. 189–191) requiring FEC to abide by all the rates of pay, rules and working conditions specified in the existing collective bargaining agreements until the termination of the statutory mediation procedures "except upon specific authorization of this Court after a finding of reasonable necessity therefore upon application of the FEC to this Court * * *."[12]

On November 12, 1964, FEC filed an application in the district court for the approval of certain "reasonably necessary" departures from its existing agreements with its non-operating unions pursuant to the *Trainmen's* decision. The district court held hearings on this application (R. 593–898), and on December 3, 1964, it granted some of the requests and denied others (R. 223–225). Specifically, FEC was permitted to exceed the ratio of apprentices to journeymen and age limitations set forth in the agreements, to contract out

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contained in its existing collective bargaining agreement with the Trainmen's union. On March 14, 1964, the Fifth Circuit stayed that injunction pending appeal.

[11] The Fifth Circuit also held in that case that FEC could institute certain work rules applicable to operating employees, as to which the statutory procedures concededly had been exhausted. The unions had urged that FEC's proposal to implement the "Uniform Working Agreement" had superseded the proposal to change the agreements in the manner set forth in the earlier proposal. Those changes in work rules were not applicable to non-operating unions, and therefore do not affect this case.

[12] The injunction was issued on October 30, 1964, but FEC was given two weeks to come into compliance. When FEC filed its application for approval of certain employment prac-

certain work, and to use supervisory personnel to perform certain jobs for which FEC had shown that properly trained personnel were unavailable. The district court denied, however, FEC's requests that it be allowed to disregard completely craft and seniority district restrictions (*i.e.*, that FEC be allowed to work under whatever work rules it desired), that it be allowed to use supervisors to perform craft work any time it decided that it did not have sufficient personnel, that it be relieved of its obligations to furnish seniority rosters, and that the union shop be declared "void and unenforceable" as to employees hired after January 23, 1963.[13]

Both sides appealed. FEC took the position, which had been rejected in the *Trainmen's* decision, 336 F. 2d at 180, that its agreements were totally "suspended" for the duration of the strike, and that it therefore could operate under any work rules it desired during the strike.[14] The United States contended, on the

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tices on November 12, 1964, the district court further stayed the injunction insofar as it would have prevented FEC from continuing in effect the departures from its collective bargaining agreements for which it sought authorization (R. 222).

Because FEC's application for authorizations to depart from its agreements (R. 216–220) was so sweeping as virtually to deprive the injunction of any force, the stay thus had the practical effect of delaying the enforcement of the injunction until December 10, 1964, the effective date of the district court's Order of December 3, 1964, granting some departures as "reasonably necessary." (See R. 225).

[13] The last request was made in the face of an explicit prior holding by the Fifth Circuit (336 F. 2d at 182) that FEC had violated the Act when it unilaterally abolished the union shop provision. See footnote 3, *supra*, pp. 5–6.

[14] FEC also contended that the district court erred in requiring it to make a showing of the reasonable necessity of the

other hand, that the Act forbids a railroad from unilaterally implementing any changes in rates of pay, rules or working conditions, unauthorized by existing collective bargaining agreements; that this prohibition applies during a strike; and that the district court and court of appeals had therefore erred in permitting any suspension of the agreement in this case. The court of appeals affirmed on the basis of its prior decision in the *Trainmen's* case, reiterating that, although the carrier's right of self-help "is not a license for wholesale abrogation of the agreement," FEC could, upon authorization by the district court, "institute and maintain such employment practices, etc. as are, and continue to be, reasonably necessary to effectuate its right to continue to run its railroad under the strike conditions." 348 F. 2d at 686.

ARGUMENT

INTRODUCTION AND SUMMARY

Section 2, Seventh, of the Railway Labor Act (45 U.S.C. 152, Seventh) provides that "[n]o carrier * * * shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title." Section 156 (Section 6 of the Act) and the sections to which

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deviations from its agreements before implementing them, rather than allowing FEC to work under the rules it desired and requiring the United States or the unions to attempt to prove that the departures were not reasonably necessary. FEC further urged that the district court erred in not granting certain of the specific requests, such as the request that the union shop be declared "void and unenforceable" as to new employees.

it, in turn, refers (Sections 5 and 10 of the Act, 45 U.S.C. 155, 160) require that, before such changes are made, the carrier serve notice upon the bargaining representatives of the employees concerned, and that it negotiate with those representatives over the proposed changes. Mediation under the auspices of the National Mediation Board may be invoked by either party or by the Board itself, the parties are encouraged to submit their dispute to binding arbitration if mediation fails and, in some circumstances, a Presidential Emergency Board may be created to recommend the basis of a settlement. Each of these provisions for negotiation, mediation, arbitration and an Emergency Board reiterates that no changes in existing rates of pay, rules, and working conditions are to be made by the carrier while a negotiated solution to the dispute is thus being attempted.

It is conceded that, in the ordinary case, these provisions prohibiting a carrier from making unilateral changes without prior negotiation are fully and literally effective. *E.g., Manning* v. *American Airlines,* 329 F. 2d 32 (C.A. 2), certiorari denied, 379 U.S. 817; *Butte Anaconda & P. Ry. Co.* v. *Brotherhood of L. F. & E.,* 268 F. 2d 54 (C.A. 9), certiorari denied, 361 U.S. 864; *R.R. Yardmasters* v. *Pennsylvania R. Co.,* 224 F. 2d 226 (C.A. 3); *Ry. Employees' Coop. Ass'n* v. *Atlanta B. & C. R.,* 22 F. Supp. 510 (D. Ga.). It is common ground, therefore, that a carrier may

not ordinarily change rates of pay, rules or working conditions without the agreement of the union or unions involved unless it first subjects the proposed changes to all the statutory negotiation and mediation processes. Any attempt by the carrier to do otherwise may be enjoined. The question presented in this case is whether this prohibition upon unilateral, non-negotiated, changes remains applicable during a lawful strike against the carrier, or whether, once a lawful strike commences, a carrier may immediately and unilaterally institute either sweeping or limited changes in agreements setting wages, rules or working conditions without regard to the obligation to negotiate or subject disputes to mediation.

In our view, the Act's prohibitions remain fully applicable during a lawful strike. The language of the Act is unqualified and the rigorous system for compelling negotiation of all proposed changes in agreement setting wages, rules, and working conditions admits of no implicit exception during a strike. Even more importantly, any such exception would inevitably subvert the Act's orderly procedures for negotiating all disputes by encouraging carriers to seek to achieve favorable settlements through the use of unilateral action rather than negotiation. We discuss these reasons in the first section of this brief.

While the court of appeals in this case agreed that the Act's prohibitions should therefore be applied to forbid the sweeping unilateral changes in wages, rules and working conditions which the carrier in this case sought to institute at the onset of the strike, it held that the Act does not prohibit unilateral strike

changes in agreements where "reasonably necessary" to "effectuate" the carrier's right to operate during the strike. The changes actually permitted by the district court in this case were narrow. The "reasonably necessary" rule under which they were made, however, is one of uncertain and potentially broad application and we urge its reversal. In the first place, like the broader argument for unlimited changes urged by the carrier here, the court of appeals' rule is contrary to the explicit *status quo* provisions of the Act. Moreover, to the extent that such a rule might be used, in the future, to permit important unilateral changes under the excuse of "necessity," the rule will constitute a serious dilution of the statutory requirements only slightly less significant than a permission to make unlimited changes. In addition, the existence of such a rule, by holding out to a carrier the possibility of obtaining, at the onset of a strike, substantial and immediate unilateral deviations from conditions as set by its collective bargaining agreements, is itself disruptive regardless of the deviations from the agreement ultimately obtained in particular cases. A "reasonably necessary" exception to the Act's provisions has never before been thought necessary by any court, nor has it been invoked by carriers before this case. In light of its substantial dangers and uncertain content and the lack of necessity for its creation, the exception should, we believe, be rejected by this Court. We discuss this contention in the second section of this brief.

The final issue in this case concerns the standing of the United States to bring this suit for injunction

under the Railway Labor Act. In our view, a clear basis for the standing of the United States is found in the provision of Section 2, Tenth, of the Railway Labor Act (45 U.S.C. 152, Tenth) which expressly authorizes the United States to prosecute "all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof * * *". The United States also has standing here in order to protect the jurisdiction of the National Mediation Board, a jurisdiction which has been meaningfully frustrated in this case by FEC's unilateral implementation of changes in pay rates, rules and working conditions prior to the exhaustion of the statutory procedures supervised by that body.

I

A CARRIER SUBJECT TO THE RAILWAY LABOR ACT MAY NOT UNILATERALLY CHANGE RATES OF PAY, RULES, OR WORKING CONDITIONS AS PROVIDED IN EXISTING COLLECTIVE BARGAINING AGREEMENTS BECAUSE OF THE EXISTENCE OF A LAWFUL STRIKE

Under the Railway Labor Act (45 U.S.C. 151 *et seq.*) a carrier is expressly forbidden unilaterally to alter existing agreements setting rates of pay, rules or working conditions. Such proposed changes must first be submitted to negotiation and governmental mediation (if the affected union or the National Mediation Board so request); there must, in addition, be access to binding arbitration and in some instances, to the recommendation of a Presidential Emergency Board. Before these procedures are invoked—and while they are in progress—the *status quo* must be

maintained. No less than four separate provisions of the Act contain this requirement.[15]

A carrier's obligation under the Act to negotiate before instituting changes is thus stated in absolute and wholly unqualified terms; no "strike conditions" exception is recited or implied. In this case, however, FEC unilaterally instituted sweeping changes in its existing agreements through its implementation of the "Conditions of Employment" and the "Uniform Working Agreement," and the carrier refused to withdraw this action after statutory bargaining had commenced. Such action was in plain violation of the Act's terms. FEC urges, however, that its conduct was not unlawful because these changes were instituted by it only after the occurrence of a strike called by the unions upon the breakdown of negotiations over a wage and notice dispute which had fully exhausted the statutory bargaining process. FEC thus contends that a lawful strike over one dispute, after all statutory negotiation has been exhausted with regard to that dispute, justifies a carrier in making immediate unilateral changes in any other conditions of employment. This contention is not only

[15] The Act is, in this regard, much more explicit and affirmative a system of regulation than is the National Labor Relations Act, which requires negotiation as a predicate to changes in existing wages or working conditions only insofar as that is necessary to satisfy a generalized duty to bargain in good faith. This Court has recognized that "[t]he relationship of labor and management in the railroad industry has developed on a pattern different from other industries. The fundamental premises and principles of the Railway Labor Act are not the same as these which form the basis of the National Labor Relations Act," see *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30, 31–32, n. 2. See, also, footnote 27, *infra*, p. 37.

inconsistent with the plain words of the statute, but would result in the virtual destruction of the fundamental plan of the Act to require negotiated solutions to railway labor disputes.

A. THE UNQUALIFIED TERMS OF THE RAILWAY LABOR ACT PROHIBIT UNILATERAL CHANGES IN EXISTING AGREEMENTS WITHOUT PRIOR COLLECTIVE BARGAINING

We turn first to the text of the Act. Two separate classifications of labor disputes, subject to different required procedures of settlement, are identified.

(1) The first class of disputes, so-called "minor" disputes, are not directly involved in this case. These are disputes over the application of existing agreements, *i.e.*, "disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions * * *." (Section 3, First (i), 45 U.S.C. 153, First (i), *infra*, p. 60). These disputes "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of" the National Railroad Adjustment Board. This is a board of arbitration composed of equal numbers of carrier and union representatives and, where necessary, of a neutral referee selected either by the members of the board or by the National Mediation Board (*ibid.*); see also Section 3, First (a)(1); 45 U.S.C. 153, First (a)(*l*), *infra*, p. 60). The adjustment boards' decisions of minor disputes shall "be

final and binding upon both parties to the dispute * * * (Section 3, First (m), 45 U.S.C. 153, First (m)). Judicial enforcement of adjustment board orders may be obtained in the district courts, where the findings of the board "shall be prima facie evidence of the facts therein stated * * *" Section 3, First (p), 45 U.S.C. 153, First (p)).

This Court has found it implicit in these provisions that they are the exclusive means of settling "minor" disputes. Thus, a union may not engage in a strike as a means of compelling a non-statutory settlement; and such a strike will be enjoined. *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30. Similarly, an employer may not resort to unilateral action "to defeat the jurisdiction of the Adjustment Board through economic pressure rather than arbitration." *Id.*, 353 U.S. at 34, n. 8.

(2) The disputes immediately relevant to this case are not "minor" disputes over the application of an existing collective bargaining agreement, but so-called "major" disputes over proposed *changes* in existing rates of pay, rules and working conditions as provided in present agreements. In these disputes, the carrier seeks admitted departures from the existing terms of employment, to which the union does not agree. One of these disputes in this case—the wage and notice dispute which was the precipitating cause of the strike of FEC—has been through the full processes of statutory negotiation and mediation, including the convening of a Presidential Emergency Board. There is no question as to this dispute that,

having fully complied with its statutory obligation to bargain, FEC may now make changes in existing wage and notice provisions so long as those changes do not go beyond the proposals over which it has negotiated. *Flight Engineers Int'l Ass'n* v. *Eastern Air Lines,* 208 F. Supp. 182 (S.D.N.Y.), affirmed, 307 F. 2d 510 (C.A. 2), certiorari denied, 372 U.S. 945.

The question here concerns the second of the relevant major disputes, *i.e.,* FEC's sweeping revision of existing rules and employment conditions as embodied in the "Conditions of Employment" and the "Uniform Working Agreement." There has never been full statutory bargaining over these changes, and they were instituted before such bargaining commenced. The question is whether these changes—as to which the statutory processes have never been exhausted—may lawfully be made by the carrier, contrary to the terms of the Act, because of the existence of strike conditions caused by the separate wage and notice dispute.

The provisions of the Act which, in our view, prohibit a carrier from taking such action in all circumstances are as follows:

(i) Section 2, Seventh (45 U.S.C. 152, Seventh, *infra,* p. 57), provides that:

> No carrier, its officers or agents shall change the rates of pay, rules or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

FEC's action in unilaterally substituting the "Conditions of Employment" and, subsequently, the "Uni-

form Working Agreement," for its existing collective bargaining agreements, without submitting its proposals to the statutory bargaining procedures, was in plain violation of this provision. Indeed, by first changing the pay, rules and conditions in effect and then formally proposing to do what it had already done, FEC did exactly what the Act forbids. *E.g.*, *Manning* v. *American Airlines, supra,* 329 F. 2d 32, 35.

(ii) Section 156 (Section 6 of the Act, 45 U.S.C. 156, *infra,* p. 62), describes the first steps of the required bargaining. The carrier (or the union, where it proposes changes in existing conditions) must give at least thirty days' written notice of intended changes in agreements. A conference between the parties must be arranged within this period. Here again the Act unequivocally states that "rates of pay, rules, or working conditions shall not be altered by the carrier * * *" pending such negotiation (*ibid.*). FEC, however, implemented sweeping changes before negotiation took place, and it did not suspend the changes during the course of negotiation.

(iii) If the required face-to-face negotiation between the parties does not result in agreement, Section 5, First of the Act (45 U.S.C. 155, First, *infra,* p. 61), then provides that either party to the dispute may request the services of the National Mediation Board, as the non-operating unions did here after their conference with FEC had terminated (see Statement, *supra,* p. 6). The Mediation Board may, in addition, proffer its services on its own initiative. In either event, the Board is required to attempt, through mediation, to bring the parties to an agree-

ment. The provision of Section 6 of the Act, quoted in the previous paragraph, forbidding the carrier to alter agreements setting wages rules or working conditions during negotiations, is expressly made of continued applicability while the dispute is thus under mediation. FEC, however, maintained its unilaterally imposed changes after mediation was invoked by the unions and while such mediation has been in progress.[16]

(iv) If mediation is unsuccessful, the Mediation Board is further required by Section 5, First, to "endeavor * * * to induce the parties to submit their controversy to arbitration." If arbitration is refused by one or both parties, the board must then notify the parties that its mediatory efforts have failed. Even in this event, however, "no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose" for thirty days after the termination of mediation. Mediation has never been terminated in this case as to FEC's broad work-rules proposals.

(v) The Act's final provision, where other negotiation procedures fail, calls for the establishment by the President of an *ad hoc* Emergency Board to investigate and make recommendations concerning disputes which "threaten substantially to interrupt interstate commerce to a degree such as to deprive any

[16] In the event that mediation is not requested by the parties and the mediation board does not proffer its services, the Act provides that "rates of pay, rules, or working conditions shall not be altered by the carrier * * * unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board" (Section 6 (45 U.S.C. 156), *infra*, p. 62).

section of the country of essential transportation service." Once again the Act unqualifiedly forbids unilateral changes "in the conditions out of which the dispute arose" until thirty days after the Emergency Board has made its report to the President.

In sum, four separate provisions (Section 2 Seventh; Section 5, First; Section 6; and Section 10) of the Railway Labor Act explicitly forbid a carrier unilaterally to change existing agreements setting rates of pay, rules or working conditions,[17] but require it first to subject such proposed changes to bargaining with the representatives of the affected employees. The required processes of such bargaining—notice, negotiation, mediation, and access to arbitration and the recommendations of a Presidential Emergency Board—are set forth in specific detail and no exceptions are suggested. FEC in this case unilaterally implemented both the "Conditions of Employment" and the "Uniform Working Agreement" without ever conducting negotiations with the statutory bargaining representatives, nor did FEC

[17] The uniform understanding seems to be that the statutory prohibitions are also applicable to changes in existing conditions which were originally set through collective bargaining, even though the collective agreement may formally have terminated. See *Western Air Lines* v. *Flight Engineers Int'l. Ass'n.*, 194 F. Supp. 908, 909 (S.D. Cal.). The issue, in all events, ordinarily does not arise, for collective agreements in industries subject to the Railway Labor Act—including the agreements in this case—do not terminate on a fixed date, but traditionally continue in force until a new agreement is reached. (See, *e.g.*, Rule 76, Agreement Between FEC and Clerical and Station Employees, Prescribed by the Brotherhood of Railway and

suspend its changes once the statutory procedures had been invoked and negotiations and mediation were in progress. This action was therefore in plain violation of the Act.

B. THE PURPOSES OF THE RAILWAY LABOR ACT DO NOT PERMIT AN EXCEPTION TO THIS UNQUALIFIED PROHIBITION BECAUSE OF A LAWFUL STRIKE

Exceptions from the plain terms of the Railway Labor Act are justified only by a "clear showing of a contrary or qualified intention of Congress." *Brotherhood of Railroad Trainmen* v. *Chicago, R. & I. R. Co.*, 353 U.S. 30, 35. The relevant legislative history of the Act, summarized in the footnote, gives no support whatsoever to such strike qualification upon the Act's negotiation requirements and FEC has not suggested otherwise.[18] Moreover, as we

Steamship Clerks, etc., pp. 88–89, providing that "[t]his agreement * * * shall continue in effect until changed as provided herein or in accordance with the Railway Labor Act * * *"). Once the negotiation and mediation process has been exhausted with regard to particular proposed changes, the carrier may amend the existing agreement by implementing those changes. See *Flight Engineers Int'l Ass'n.* v. *Eastern Air lines*, 208 F. Supp. 182 (S.D.N.Y.), affirmed, 307 F. 2d 510 (C.A. 2), certiorari denied, 372 U.S. 945.

[18] Section 2, Seventh, was enacted in 1934 as an amendment to the Act for the purpose of clarifying and strengthening the "status quo" provisions which have always been contained in Section 6 and 10 of the Act. These provisions had always been understood as requiring the parties to a dispute to maintain the "status quo" pending the statutory negotiation process; that is, the carrier may not change the rates of pay, rules and conditions of its employees during that time, or lockout its employees, and the union may not strike over its demands while mediation is in process. Mr. Donald Richberg, one of the

now show, such an exception, generally permitting unlimited unilateral changes in existing agreements because of the occurrence of a lawful strike over a narrowly defined dispute which had been subjected to all the statutory procedures, would be wholly inconsistent with other provisions of the Act and with its fundamental purpose "to provide for the prompt and orderly settlement," between an employer and the statutory representatives of his employees, "of all disputes concerning rates of pay, rules, or working con-

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authors of the original bill, stated in this regard: "As to maintaining the status quo from the time that a dispute is engendered, it is a violation of the duties imposed by this law for either party to take any action to arbitrarily change the conditions until that dispute has been adjusted in accordance with the law. Their primary duty is to exert every reasonable effort to avoid interruptions of commerce through disputes." (Hearings on H.R. 7180, House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess. (1926), pp. 92-93). The House Committee Report which accompained the bill similarly stressed the initial obligatory steps to be taken by the parties, in disputes over changes in pay, rules and conditions, and expressed the hope that this mandatory procedure would lessen the interruptions to interstate commerce, which had been frequent in the years just prior to the passage of the Act. See H. Rep. No. 328, 69th Cong., 1st Sess. (1926), p. 1. See also Hearings on H.R. 7180, House Committee on Interstate and Foreign Commerce, 69th Cong., 1st Sess. (1926), p. 199.

In 1934, when Congress undertook to strengthen both the mandatory and voluntary features of the Act, it added Section 2, Seventh, which flatly, and without qualification, broadly forbids carriers to change the rates of pay, rules and conditions of its employees in any manner other than that set forth in the agreements or in Section 6 of the Act. Thus the statute now not only negatives changes during statutory negotiations, but it also states affirmatively that changes may only be made *through* negotiation. There is nothing in the legislative history either of this amendment or the original Act to suggest that this requirement may not be applicable in strike conditions.

ditions." (Section 2, 45 U.S.C. 151a(4); see also Section 2, First, 45 U.S.C. 152, First; *Elgin, J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 725).

It is clear that the duty of a carrier to attempt to settle major disputes with representatives of the employees concerned is not suspended during a strike. And, as the court of appeals recognized in this case, the union which represented the employees in a given craft or class prior to the strike unquestionably remains the representative of such employees for this purpose—whether or not they are union members—while a strike is in progress.[19] See, also, *Steele* v. *L. & N. R. Co.*, 323 U.S. 192; cf. *Brotherhood of R. Trainmen* v. *Howard*, 343 U.S. 768. It is equally clear that employees who remain at work during a strike—regardless of whether they were pre-strike employees or are replacements and regardless of their union membership—are entitled to the benefits of any existing collective bargaining agreements covering the class or craft in which they work.[20]

Thus, while the onset of a lawful strike, after the statutory negotiation procedures are fully exhausted in relation to a particular major dispute, permits the employer to implement the changes as to which nego-

[19] The Railway Labor Act, unlike the National Labor Relations Act, 29 U.S.C. 151, contains no provision for decertification of a union which loses its status as majority representative.

[20] Thus, if a union called a strike against a carrier, and only half the union members went on strike, the carrier clearly could not deprive the nonstriking members, or their replacements, of the benefits of wage and hour provisions in existing agreements, even by entering into individual agreements with employees. *J. I. Case Co.* v. *NLRB*, 321 U.S. 338; *Order of R. Telegraphers* v. *Ry. Express Agency*, 321 U.S. 342.

tiation has taken place, such a lawful strike clearly cannot relieve an employer of the obligation to bargain with the striking union over *other* proposed changes which have never been subjected to negotiations. Nor can it deprive workers, who either stay on the job or who replace strikers, of the benefits of the provisions of existing collective bargaining agreements which have not been lawfully amended or changed. If FEC wished to continue to operate during a lawful strike, therefore, it was required to operate pursuant to its collective agreements and it was bound to negotiate with its unions over any changes proposed in those agreements.

"Major" disputes over separate issues are, in other words, completely severable for purposes of determining when an employer may act to implement changes with which its unions do not agree. The pendency of mediation over one issue does not prevent a carrier from implementing proposals as to which mediation has been completed; nor are the unions prohibited from striking over that issue, *Pan American World Airways, Inc.* v. *Flight Engineers Int'l Ass'n.*, 306 F. 2d 840 (C.A. 2). Conversely, however, unilateral changes with respect to issues as to which bargaining has either never commenced or not been completed is not permitted merely because bargaining has been exhausted with respect to other issues. See *Pullman Co.* v. *Order of Ry. Conductors*, 316 F. 2d 556, 561–563 (C.A. 7), certiorari denied, 375 U.S. 820, reversing 49 LRRM 3162 (N.D. Ill. 1962).[21]

[21] See also *Airline Pilots Ass'n* v. *Southern Airways, Inc.*, 49 L.R.R.M. 3145, 3149 (M.D. Tenn. 1962), recognizing "the general rule, now well established, that the right of a party to

Thus, both the union's continuing status as bargaining representative during a strike and the continued obligation to obey existing collective agreements as to workers employed during that period negate any strike exception from the Act's prohibitions upon unilateral employer changes.

In addition, if a lawful strike over one dispute furnished an excuse for an employer unilaterally to change other aspects of his employee and union relationships, the general fundamental policy of the Act to require negotiated, rather than unilateral, solutions of labor disputes would be seriously—and perhaps entirely—undermined. Take, for example, the effect of such a rule upon the settlement of the dispute leading to the strike. Under the proposed rule a carrier would be permitted to use the occasion of a strike over a wage or hours dispute to make immediate sweeping changes in its work-rules to permit operation on favorable terms which could not conceivably have been obtained through negotiation. Taking advantage of this opportunity in this case, for example, FEC abolished numerous job positions and conducted strike operation only of its profitable carload freight service, abandoning passenger service and less profitable freight services.[22] Hav-

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effect changes [during a strike] is not enlarged beyond the scope of the Section 6 opener simply because procedural steps of the act have been pursued."

[22] Winfred L. Thornton, President of FEC, testified that "we've been able to eliminate to a very large degree the featherbedding that's been in the railroad industry" (R. 367). See also, footnote 9, p. 9, *supra*, and the statement, p. 8, *supra*, indicating that FEC has substantially resumed profitable operations during the strike.

ing made such changes, a carrier might naturally have little incentive to reach a settlement of the dispute which led to the strike, and indeed, might have strong reason to prolong the strike. In some circumstances, a temptation would undoubtedly even be created for a railroad or airline to precipitate a strike over one issue—or to make no effort to avoid a strike by bargaining in good faith with respect to the union's demands—in order to permit the carrier thus unilaterally to abrogate the entire collective bargaining agreement on the most favorable terms.

At the very least, whether the carrier wishes a settlement or not, suspension of the bargaining requirements during the course of a strike will inevitably and detrimentally broaden the area of dispute between the parties. Changes in pay, rules and conditions unilaterally effectuated by the carrier at the onset of the strike will surely constitute new issues between the parties. FEC's unilateral changes here, for example, have superimposed disputes over radical changes in work-rules and conditions onto an existing wage and notice dispute of relatively narrow compass. These unilateral changes have, without question, decreased the likelihood of a prompt settlement of the underlying strike, regardless of the good faith of the parties. The underlying wage and notice dispute in this case has been settled on every other railroad in the United States, and the National Mediation Board has found that it "could and should be resolved by a small amount of bona fide collective bargaining" between FEC and the unions here. (Exh. Vol. 457). There is no doubt that FEC's sweeping unilateral

abrogation of its collective agreements in favor of rules of its own devising has helped to forestall such a negotiated solution.

A strike-conditions exception would, in addition, have the same debilitating effect upon the process of negotiations with regard to the major dispute created by the carrier's unilateral, strike-imposed changes. Where, as here, the carrier has filed a notice under Section 6 of the Act seeking to impose those changes permanently, as well as during the strike, the parties would be placed in the position of discussing "proposed" changes which are already in effect. Meaningful bargaining or mediation cannot possibly be undertaken in these circumstances. See, *e.g.*, *Manning* v. *American Airlines*, 329 F. 2d 32, 35 (C.A. 2), certiorari denied, 379 U.S. 817; *Butte, Anaconda & P. Ry. Co.* v. *Brotherhood of L. F. & E.*, 268 F. 2d 54 (C.A. 9), certiorari denied, 361 U.S. 864. As the court of appeals here realized, the processes of bargaining and mediation called for by the Act are thus "a sham if a Carrier has already done in fact what it formally seeks to do in negotiation of a § 6 notice." *Florida East Coast Ry. Co.* v. *Brotherhood of R. Trainmen, supra*, 336 F. 2d at 180.[23]

A strike conditions exception would, in sum, be totally inconsistent with the statutory scheme for

[23] The Emergency Board which sought to recommend a settlement of the strike in this case, believed that FEC's actions probably had the very effect noted in the text. In light of FEC's unilateral implementation of its Uniform Working Agreement during the strike (while FEC proposed, under Section 6, to negotiate over the permanent implementation of the Uniform Working Agreement) the Board stated in re-

bargaining in the railway and airline industries. Under it, a struck carrier, wishing to establish broad changes in work rules or conditions of employment, would be entitled unilaterally to implement the rules if desired at the onset of a strike, even though wholly separate issues had precipitated the strike. The carrier would then be encouraged adamantly to refuse to bargain further over the dispute which caused the strike and await the termination of mediation over its proposed sweeping changes—mediation which would in turn almost necessarily prove fruitless because of the carrier's previous implementation of the changes it seeks. Upon the eventual termination of mediation, all the proposed changes might be instituted regardless of the union's wishes. In this way, a carrier, as the consequence of a lawful strike over one issue, would be able permanently to change the wages, rules and working conditions of its employees as it desired without ever subjecting these changes to meaningful negotiation or mediation with the representatives of its employees.

These results would follow, moreover, whether the unilaterally instituted changes made at the onset of the strike are formally imposed permanently—as in this case—or whether they are announced as effective only for the duration of the strike. In either case the strike-imposed changes may be accompanied by a proposal to institute identical changes permanently and in either case they make all the issues between

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sponse to FEC's expressed desire to have the Emergency Board make recommendations as to all its proposed changes (in addition to the underlying wage and notice dispute), that "we doubt whether the Carrier genuinely desires the Board to consider these matters" (Exh. Vol. 464).

the parties more difficult of settlement. There is simply no justification for injecting these disruptive elements into railway-labor relationships contrary to the plain language of the statute. For these reasons, we submit that the specific terms of the statute, unqualifiedly prohibiting a carrier from unilaterally imposing changes in existing wages, rules, or working conditions without prior negotiation, remain fully applicable during the course of a lawful strike.[24]

II

THE COURT OF APPEALS ERRONEOUSLY CREATED AN EXCEPTION PERMITTING UNILATERAL CHANGES BY A CARRIER IN AGREEMENTS SETTING WAGES, RULES, OR WORKING CONDITIONS WHEN "REASONABLY NECESSARY" TO A CARRIER'S OPERATIONS DURING A STRIKE

The court of appeals in this case recognized that, as urged in the preceding section of this brief, the terms and purposes of the Railway Labor Act plainly require that there be no exception permitting a carrier immediately to make sweeping unilateral changes in rates of pay, rules, or working conditions as set by existing agreements upon the occurrence of a lawful

[24] A similar rule, forbidding an employer to ignore the duty to bargain with the union merely because of the existence of a strike—or to ignore existing collective agreements during that time—also applies under the National Labor Relations Act as an element of the obligation of an employer to bargain in good faith with the representatives of his employees. See, e.g., *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221; *Packinghouse Workers* v. *Needham Packing Co.*, 376 U.S. 247; *National Labor Relations Board* v. *Peacheur Lozenge Co.*, 209 F. 2d 393, 403 (C.A. 2). This is true, even in the absence of explicit *status quo* provisions in that Act. See footnote 27, *infra*, p. 38.

strike. The court held, however, that an exception to the Act should be created, whereby a carrier would be permitted, unilaterally and without any adherence to the statutory negotiation and mediation procedures, "to institute and maintain such employment practices, etc. as are, and continue to be, reasonably necessary to effectuate its right to continue to run its railroad under the strike conditions." 336 F. 2d 181–182.

While this exception is stated as being more limited in application than the total suspension of existing collective agreements during the course of a strike which has been urged by FEC, it is invalid for essentially the same reasons. Like the broader exception, it is directly contrary to the unambiguous language of the Act providing that "[n]o carrier * * * shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title." Like the broader exception, it also ignores the continuing status of the union as bargaining representative under the Act—and thus its continuing right to be consulted about all changes—as well as the right of employees who work during a strike to the benefits and rules of existing collective bargaining agreements covering the jobs in which they work. Finally like the broader exception, it is also likely to constitute a troublesome and disruptive element in railway labor relations by standing as a barrier to negotiated solutions of major disputes between carriers and unions.

A. THE SAME DANGERS INHERE IN A "REASONABLY NECESSARY" EXCEPTION AS IN A BROAD RULE OF TOTAL SUSPENSION OF EXISTING AGREEMENTS

We recognize that, as so far applied by the district judge in this case, the court of appeals' principle has been used here to permit only relatively minor unilateral changes in FEC's existing collective bargaining agreements (see Statement, *supra,* pp. 11–12). These changes thus permitted are, however, within the broad changes which FEC seeks to institute permanently through its proposal, under Section 6 of the Act, to replace its existing collective bargaining agreements with the "Uniform Working Agreement." To the extent that some proposed permanent changes have thereby been unilaterally instituted by FEC without negotiation or mediation, the dangers, described in the preceding section of this brief, of defeating meaningful good faith bargaining over such proposed changes and of broadening the area of dispute and thus lessening the chances of settling the underlying strike, are fully present in this case.

Our principal concern, however, is for the potential future impact upon railway labor relationships of the "reasonably necessary" principle. The application of this principle is by no means limited to trivial variations in existing conditions, for its touchstone is the carrier's "right" to "operate" regardless of strike adversity. There is no reason, therefore, why the principle, if valid, should not be invoked in the future to permit sweeping unilateral changes in wage rates, hours of work, and work rules and conditions where a carrier correctly asserts that shortages of manpower and financial hardship during a strike necessitate such

changes if it is to continue operations. Radical revisions in job descriptions and requirements may also be justified and, under this principle, a carrier may also use a strike to alter the form of service offered to the public. In this case, for example, FEC sought to change its agreements during the strike to enable it to carry only carload freight—but not to carry less than carload freight or to offer passenger service—and it also sought to use the strike to eliminate "featherbedding" by operating with a vastly reduced work force.[25] In addition, the principle may be used, where some strike operation is possible under existing agreements, to permit even more expanded operation. Here, for example, FEC officials testified that the carrier could have operated at 50 percent of its freight capacity in strict accord with its agreements, yet "reasonably necessary" changes were still permitted.[25a]

Thus, changes "reasonably necessary" to strike operations may well constitute the most comprehensive revisions of employment conditions. To this extent, the "reasonably necessary" exception, no less than the broadly stated argument of total suspension of existing agreements during strike conditions, will present all the obstacles to the orderly settlement of labor disputes described in the previous section of the brief. Even more importantly, the mere existence of such a rule, of wholly uncertain content and virtually unlimited potential breadth, has

[25] See footnote 22, *supra*, p. 29.

[25a] See footnote 9, *supra*, p. 9.

unsettling effects which are not easily dissipated. Under such a rule, any carrier engaged in a major dispute would always be offered the possibility, should a strike occur, of immediately obtaining some—though perhaps not all—of the comprehensive and long-range changes it may desire in its basic work rules. This prospect cannot help but detract from good-faith bargaining. Energies would, moreover, inevitably be directed on the part of the carrier in all cases to the prospects which the rule offers for ending any strike, not by compromise and good-faith negotiation as the Act requires, but by obtaining the ability, through abrogation of existing agreements, to run profitably despite the strike.

Nor can we ignore the fact that the court of appeals' principle necessarily commits to individual district judges the essentially discretionary decision as to what steps are economically "reasonably necessary" for a carrier to meet strike conditions. The rule, as the court of appeals candidly recognized, moves the judge "into the locomotive cab." 348 F. 2d at 686. It thus stands in direct conflict with the salutary and long-standing policy of federal labor legislation to remove the influence of judicial discretion and fiat from the settlement of labor disputes. *American Ship Bldg. Co.* v. *NLRB*, 380 U.S. 300, 315–316.[26] The rule would also be likely to result in forum shopping by interstate carriers affected by strikes to find a favorably disposed judge to mete out *ad hoc*,

[26] The area into which the decision below would have the district courts intrude is one of "delicate and contemporaneous issues of policy" where "economic sympathies and pre-

and largely unreviewable, deviations from existing agreements.

We thus submit that the "reasonably necessary" rule of strike operation, no less than an unlimited exception for strike changes, constitutes a wholly unwarranted and seriously disruptive intrusion into the orderly system of labor-management relationships created by the Railway Labor Act. Such a rule should, in these circumstances, not be established unless it has clear historical roots within the railway industry as an implicit gloss upon the otherwise unqualified statutory language. We now show that such an understanding has never existed and that, moreover, no practical considerations justify according a carrier relief from its existing agreements in opposition to the clear terms of the Act.[27]

B. NO UNDERSTANDING IN THE RAILWAY OR AIRLINE INDUSTRIES SUPPORTS A "REASONABLY NECESSARY" EXCEPTION TO THE OBLIGATION TO ENFORCE EXISTING AGREEMENTS

Despite a significant number of strikes in the railway and airline industries since the inception of the Railway Labor Act, there is no evidence that a "rea-

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possessions [of individual district judges] may unwittingly foreclose the solution of these issues." Frankfurter and Greene, *The Labor Injunction* (1930) p. 132.

This is not to suggest the slightest criticism of Chief Judge Simpson, whose conduct of the many difficult proceedings arising out of this dispute has, as the Fifth Circuit stated (348 F. 2d at 686), been "distinguished." But few other district judges can be expected to be as conversant with the operations of the railroad involved in the case before them.

[27] To some extent, the court of appeals rested its decision here upon cases arising under the NLRA (See 336 F. 2d at 181). It is not accurate, however, to suppose that a right to deviate from *existing collective bargaining agreements* (the sit-

sonably necessary" exception to the Act's prohibitions upon unilateral employer action is required in order to permit operation during a strike. Indeed, such an exception has never before been urged by a carrier or court as being inherent in the Act. On the contrary,

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uation in this case)—as opposed to a right to change conditions not covered by existing union agreements—has been recognized under the NLRA. In fact, where deviation from existing working conditions have been permitted during a strike under the NLRA, the situations have uniformly been ones in which no collective bargaining agreements have existed between the union and the employer.

The extent to which an employer, in attempting to operate during a strike (See *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345–346), can act unilaterally has not been fully delineated under the NLRA. On the one hand, it is clear that a strike does not suspend the employer's general obligation to bargain with the union (*National Labor Relations Board* v. *Peacheur Lozenge Co.*, 209 F. 2d 393, 403 (C.A. 2)), and therefore any unilateral action which is not reasonably necessary to maintain strike operations would be clearly unlawful. *National Labor Relations Board* v. *Tom Joyce Floors*, 353 F. 2d 768, 771–772 (C.A. 9). On the other hand, after a collective agreement covering the plant has terminated, the employer may, to some extent, establish the terms and conditions of employment of the replacements without consultation with the union. *Times Publishing Co.*, 72 NLRB 676, 684. There is, in addition, some *dictum* to the effect that the employer may *in this situation* perhaps even offer the replacements higher wages than he offered the union during negotiations, where this is a temporary measure and it is necessary to attract replacements. Compare *Pacific Gamble Robinson Co.* v. *National Labor Relations Board*, 186 F. 2d 106, 109 (C.A. 6), with *Tom Joyce Floors*, *supra*. The validity of such *dictum* is in doubt, in light of *National Labor Relations Board* v. *Katz*, 369 U.S. 736 and *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221. The employer may, to some extent, also unilaterally subcontract work for the duration of the strike where this violates no existing agreement. *Hawaii Meat Co.* v. *Na-*

carriers and the adjustment boards, which are the primary statutory agency for interpreting the effect of collective agreements, have uniformly assumed that collective bargaining agreements remain in full force during a strike, except for those provisions as to which changes have been proposed and fully nego-

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tional Labor Relations Board, 321 F. 2d 397 (C.A. 9), *Empire Terminal Warehouse Co.*, 151 NLRB No. 125, 58 LRRM 1589. On the other hand, this Court has expressly held that even a strike in violation of a no-strike clause of an existing agreement does not relieve the employer of his obligation to process grievances under the agreement. *Packinghouse Workers* v. *Needham Packing Co.*, 376 U.S. 247. Nor may the employer offer superseniority to replacements, even though this may be necessary in order to attract them, for this has effects which transcend the strike. *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221. The NLRA cases are thus wholly consistent with the proposition, which we urge, that the statutory duty to bargain can in no event be satisfied by an employer who asserts the right to violate an existing collective agreement. As this Court recently recognized, under the NLRA "the employer can institute unilaterally the working conditions he desires *once his contract with the union has expired.*" *American Ship Bldg. Co.* v. *NLRB*, 380 U.S. 300, 316 (emphasis added).

At any rate, even if there were some basis for thinking that employers covered by the NLRA could depart from their existing agreements during a strike, this would not be persuasive authority for the "reasonably necessary" rule engrafted onto the Railway Labor Act in this case. Unlike the Railway Labor Act, the NLRA contains no explicit "status quo" provisions applicable during the operation of existing agreements, but only a generalized duty to bargain; there certainly is no provision in the NLRA comparable to Section 2, Seventh. Moreover, in industries subject to the NLRA, unlike industries under the Railway Labor Act, some coercive self-help is apparently available during the time that negotiations over a proposed change in conditions are proceeding. Compare *National Labor Relations Board* v. *Insurance Agents Int'l Union*, 361 U.S. 477, with *Manning* v. *American Airlines*, *supra*.

tiated with the unions, and that strike operations must conform to those agreements.[28]

In the railway industry, it has been highly unusual for a struck carrier to attempt to operate. The Annual Reports of the National Mediation Board for the period 1955–1964, for example, show that there were approximately 50 strikes during that period in which railroads did not operate and no strike of consequence where operation was attempted. This practice surely indicates a recognition that any strike operations would have to be undertaken pursuant to existing agreements. Any generally recognized right to operate on the carrier's terms, when the existing agreements made such operation unfeasible, would certainly have been exercised before this case.

While operation during a strike has not generally been attempted in the railway industry, it has occurred among airlines. In these instances, the operating carriers have, without apparent exception, assumed that their collective agreements remained in full force except for proposed changes which had been fully negotiated prior to the strike, and such agree-

[28] It is well settled that other "emergency" situations, such as bankruptcy, do not justify carriers in departing from existing rates of pay, rules and conditions; the strong congressional policy against unilateral action takes precedence over any plea of economic hardship by a railroad. *Burke* v. *Morphy*, 109 F. 2d 572 (C.A. 2), certiorari denied, 310 U.S. 635; cf. *In re Overseas Nat'l. Airways*, 238 F. Supp. 359 (E.D.N.Y.).

Indeed, in § 77(n) of the Bankruptcy Act, 11 U.S.C. 205(n), Congress provided:

"* * * No judge or trustee acting under this title shall change the wages or working conditions of railroad employees except in the manner prescribed in [sections 151 to 163 of Title 45], as amended June 21, 1934, or as [they] may be hereafter amended."

ments have governed strike operations. See, *e.g.*, *Western Air Lines* v. *Flight Engineers Int'l Ass'n*, 194 F. Supp. 908, 909 (S.D. Cal.); *Flight Engineers Int'l Ass'n* v. *Eastern Air Lines*, 208 F. Supp. 180, 190 (S.D.N.Y.), affirmed, 307 F. 2d 510 (C.A. 2), certiorari denied, 372 U.S. 945. In the former case, Western explicitly conceded the continuing effectiveness of its collective agreements during the strike and in the latter case, Eastern, while urging that negotiation and mediation had been completed with respect to changes it desired to make in reinstating operations, apparently did not urge that it could institute unilateral changes during strike conditions regardless of whether mediation had been completed.[29] Finally, numerous decision of the railroad adjustment boards which arbitrate "minor" disputes under the Act reflect the clear understanding that whenever strike operation is undertaken, it must conform with with existing collective agreements.[30]

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[29] In opposing the Flight Engineers' petition for a writ of certiorari, Eastern stated: "All three of the questions petitioner proposes * * * rest upon the false premise that the courts below held it unnecessary to exhaust the procedures of the Railway Labor Act before resorting to "self-help" in the form of either a strike or unilateral changes in working conditions. It is clear, however * * *, that the decision below fully recognizes this exhaustion requirement and finds it satisfied in the circumstances of this case." (Brief in Opp., Oct. Term, 1962, No. 776, pp. 4–5.

When Eastern resumed operations by replacing striking Flight Engineers with pilots, it informed the replacements that, both in the training period and during permanent employment as Flight Engineer, "you will be covered by the current standard Eastern Air Lines Flight Engineers terms and conditions, a copy of which is being furnished you." See Appendix to Appellant's Brief, C.A. 2, No. 29997 (1965), p. 87.

[30] For example, in *Brotherhood of Ry. & S.S. Clerks* v. *Macon, Dublin & Savannah R. Co.*, 98 N.R.A.B. (3d Div.) 730

In light of this industry understanding, and the total lack of evidence that a contrary rule is necessary to insure a fair economic balance in the railway and airline industries, we submit that the Court should not, at this time, impute an exception to the unqualified terms of the statute permitting "reasonably necessary" strike changes in order to "effectuate" a carrier's asserted right of "self-help." Contrary to the assumption of the court of appeals, it is plain that the only recognized "right to operate" during a strike (336 F. 2d at 181), is one which is subject to the provisions of existing collective bargaining agreements,

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(1961), the Board held that the carrier's action in furloughing some clerical employees during a two-month strike by the Trainmen's union (during which time the carrier did not operate), was taken in full accordance with the Reduction of Force Rule in the Clerks' agreement which is similar to Rule 19 of FEC's agreement with its Clerks. The Board said that such contract provisions had been construed consistently to give the carrier the right "to reduce forces by furloughing employees or abolishing positions during a strike *while railroad operations are practically suspended*" [emphasis added], but cautioned that, even during a strike, "the Carrier may not, under the pretense of abolishing positions, evade the application of an established rule." Thus, the Board held that the carrier had taken steps to counteract the strike *in full compliance with its agreements.* See, also, *Brotherhood of Maintenance of Way Employees* v. *Missouri Pac. R. Co.*, 48 NRAB (3d Div.) 583 (1950); *Brotherhood of Maintenance of Way Employees* v. *St. Louis Southwestern Ry. Co.*, 48 NRAB (3d Div.) 291 (1950). Also cf. *Brotherhood of Maintenance of Way Employees* v. *Atlanta and West Point R.*, 39 N.R.A.B. (3d Div.) 564, 569 (1948), holding that a lockout of maintenance employees during a one-day strike of engineers and firemen violated the agreement:

"We have often held that positions once established by a Carrier may not in the absence of agreement therefor, be abolished unless the work of the positions ceases to exist. In this case, however, we find the Carrier insisting that it had the right to abolish positions 'any time we see fit.'"

as modified only by changes which have been fully subjected to the statutory negotiation process. The balance, struck by Congress in favor of no unilateral changes in existing agreements, has been uniformly accepted throughout the railway and airline industries as applicable during strikes as well as at all other times. Any modification of the available economic weapons should come, if at all, though a legislative revision of the comprehensive provisions of the statute which now create that balance. Compare, *American Ship Bldg. Co.* v. *National Labor Relations Board,* 380 U.S. 300, 315–316.

C. NO PRACTICAL CONSIDERATIONS JUSTIFY THE ARROGATION OF EXISTING AGREEMENTS IN ORDER TO VINDICATE A "RIGHT TO OPERATE"

Finally, procedures explicitly set forth in the Railway Labor Act enable a carrier either wholly to avoid or to settle a strike on equitable terms or, where deemed necessary (contrary to general railroad industry practice), to make provision for strike operations, without in the least departing from existing agreements and the statutory duty to bargain.

(1) Sections 7, 8 and 9 of the Act (45 U.S.C. 157–159) contain detailed provisions relating to the binding arbitration of railway labor disputes by a board comprised of equal numbers of carrier, union and neutral representatives. The award of such a board, when filed in a district court, has the status of a judgment which "shall be final and conclusive on the parties." (Section 9, Second, 45 U.S.C. 159, Second).[31]

[31] Section 9, Third, 45 U.S.C. 159, Third, provides for limited judicial review of such awards.

These arbitration provisions may be invoked by agreement of both parties to the dispute (Section 7, First). Thus, in a case like this one, where the unions ultimately offered to submit the underlying wage dispute to binding arbitration (see Statement, *supra,* p. 6), the carrier could have invoked arbitration at any subsequent time. If FEC had thus agreed to arbitrate this dispute, the effect of this step would have been to require immediate cessation of the strike on the part of the unions, an obligation enforcible against the unions by injunction during the course of arbitration. *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R. Co.,* 353 U.S. 30. FEC might thus, at any time, have immediately resumed normal operations pursuant to its agreements by submitting to arbitration. Indeed, unless the unions withdraw their offer, it may still terminate the strike at any time by taking this step.

Moreover, relief would have been available to FEC here had it offered to submit the dispute to arbitration even if the unions had rejected that proposal. This Court has held, under Section 8 of the Norris-LaGuardia Act (29 U.S.C. 108),[32] that the failure of one party to a railway-labor dispute to submit the dispute to voluntary arbitration under Section 7 of the Railway Labor Act disables that party from subsequently seeking an injunction to enforce legal obligations connected with that dispute. *Brotherhood of*

[32] That Section provides: "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery or indication of voluntary arbitration."

R. Trainmen v. *Toledo P. & W. R. Co.*, 321 U.S. 50. In that case, under the terms of Section 8 of the Norris-LaGuardia Act, 29 U.S.C. 108, a carrier was denied an injunction against strike violence because it had previously refused the unions' request to submit the dispute underlying the strike to arbitration under Section 7. Thus a union, seeking to compel a carrier to abide by its existing collective agreements during the course of a strike over a major dispute, would similarly be vulnerable to the defense that it had previously refused an offer to arbitrate the dispute, and any injunction secured by the union in such circumstances would necessarily be conditioned upon the union's acquiescence in arbitration. See *Locomotive Engineers* v. *Missouri K. T. R.*, 363 U.S. 528, 531; also compare the majority and dissenting opinions in *Rutland Ry. Corp.* v. *Brotherhood of Locomotive Engineers,* 307 F. 2d 21, 39–40, 44–45 (C.A. 2), certiorari denied, 372 U.S. 954.

(2) A carrier desiring to operate during a strike may also affirmatively secure the right to take reasonable steps in response to the shortage of manpower and other emergency conditions which may be caused thereby by bargaining for the inclusion of appropriate provisions in the collective agreement. Such emergency provisions for strike conditions are not foreign to existing agreements. For example, the Record shows (Exh. Vol. 255) that in 1954 FEC bargained with the non-operating unions with regard to the notice to be given before furloughing (locking out) employees during listed emergencies, including strikes. FEC proposed that no advance notice be re-

quired, and it gained the right to abolish jobs upon 16 hours rather than upon the 7 days notice required previously. (See Rule 16, Agreement between FEC and Machinists, Boilermakers, etc., p. 27.)[33]

An important shortcoming of the court of appeals' "reasonably necessary" rule in this case, is that it does not thus reflect the bargained understanding between the parties regarding the rights of the carrier in response to a strike. The carrier is, instead, given the right to continue strike operations on favorable terms as a matter wholly outside its existing agreements. A carrier which has explicitly agreed not to take certain action during a strike, however, in return for a settlement with the union on other issues, should certainly not be free thus to deviate from that agreement when a strike occurs. And, in light of the industry-wide understanding pursuant to which struck carriers have not generally sought to reinstitute operations during the course of a lawful strike, it is most likely that existing agreements, which contain no such specific provisions governing strike operation, do, in fact, incorporate a mutual

[33] "Rules, agreements or practices, however established, that require more than sixteen hours advance notice before abolishing positions or making force reductions are hereby modified so as not to require more than sixteen hours such advance notice under emergency conditions such as flood, snow storm, hurricane, earthquake, fire or strike, provided the Carrier's operations are suspended in whole or in part and provided further that because of such emergency the work which would be performed by the incumbents of the positions to be abolished or the work which would be performed by the employees involved in the force reductions no longer exists or cannot be performed." (Exh. Vol. 255).

understanding that strike operation will not be attempted contrary to the terms of these agreements. There is no conceivable justification for upsetting this contractual understanding, as the "reasonably necessary" rule would do.[34]

(3) Even where collective bargaining agreements make no explicit provision for a strike situation, it may be open to a carrier to urge that limited departures from the literal terms of its agreements are permissible under a fair reading of these agreements. Without in any sense departing from the agreements, relief may thus be obtained under appropriate doctrines of contract interpretation applicable to abnormal conditions. For example, should the collective agreement require hiring to be done exclusively through a union hiring hall, and should the hall become inoperative during the strike, the carrier might well urge in that circumstance that hiring of replacements might take place on another basis which respected the essentials of the collective agreement.

Indeed, at least some of FEC's unions have shown a willingness to respect such conditions of impossibility. In the *Trainmen's* case, 336 F. 2d 172, it appears that the union conceded that its agreement with FEC did not completely preclude the use of supervisory personnel in

[34] Other legitimate means of preventive self-help also are open to carriers in the event of a strike. One means of considerable potential effectiveness would be an industry-wide strike insurance plan. See *Kennedy* v. *Long Island R. Co.*, 319 F. 2d 366 (C.A. 2), certiorari denied, 375 U.S. 830; *In the Matter of Mutual Aid Pact Investigation*, C.A.B. Order E–21044 (July 10, 1964); *Six-Carrier Mutual Aid Pact*, 29 C.A.B. 168, 170–173 (1959); Briggs, *The Mutual Aid Pact of the Airline Industry*, 19 Ind. & Lab. Rel. Rev. 3 (1965).

Additionally, in operating during a strike a carrier may of course institute any changes as to which mediation has pre-

some positions when other replacements were, in fact unavailable. Similarly, the government has never suggested that FEC would be totally foreclosed from making all changes in working rules or conditions during a strike, should such changes be asserted as proper under a fair reading of the contract. Such a contention that its changes were proper under the contract, however, is not made here by FEC. Should disagreement arise over the application of contract terms where such contentions are made by the carrier under the contract and rejected by the union, the Act provides a clear basis for an arbitrated settlement through invocation of the "minor" disputes procedure by the appropriate division of the National Railroad Adjustment Board.[35]

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viously been completed. Thus, the Fifth Circuit held that FEC could institute an entirely new set of rules for its Trainmen, see *Florida East Coast Ry. Co.* v. *Brotherhood of R. Trainmen*, *supra*, 336 F. 2d at 182. The carrier also may lock out employees in accordance with the reduction of force and furlough provisions typically found in contracts in the railroad industry. See Agreement between Florida East Coast Ry. Co. (Scott M. Loftin and Edward W. Lane, Trustees) and Brotherhood of Maintenance of Way Employees, Rule 32, as revised Dec. 1, 1959 (insert at pp. 26–27). *Brotherhood of Ry. & S.S. Clerks* v. *Macon, Dublin & Savannah R. Co.*, 98 N.R.A.B. (3d Div.) 730 (1961).

[35] Under Section 3, First (i) of the Act (45 U.S.C. 153, First (i)), the adjustment boards have power to resolve "[t]he dispute between an employee or group of employees and a carrier or carriers growing out of * * * the interpretation or application of agreements concerning rates of pay, rules, or working conditions." See, generally, *Elgin J. & E. R. Co.* v. *Burley*, 325 U.S. 711, 724. Such power has been exercised by the Boards in disputes over the applicability of contracts in strike conditions. See, *e.g.*, *Brotherhood of Ry. S.S. Clerks* v. *Macon, Dublin & Savannah R. Co.*, 98 N.R.A.B. (3d Div.) 730 (1961); *Brotherhood of Maintenance of Way Employees*

In sum, neither practical nor historical considerations justify the creation of an exception to the unqualified provisions of the Railway Labor Act permitting "reasonably necessary" unilateral employer

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v. *Atlanta & West Point R.*, 39 N.R.A.B. (3d Div.) 564, 569 (1948). See, also, *Western Air Lines* v. *Flight Engineers Int'l Ass'n*, *supra*.

Alternatively, where the existing agreement has been reached through the mediation procedures of the Act, either party to such a dispute might invoke the power of the National Mediation Board to interpret the agreement under Section 5, Second of the Act (45 U.S.C. 155, Second) which provides that:

"In any case on which a controversy arises over the meaning or application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days."

The invocation of adjustment board jurisdiction, of course, cannot be used to subvert the Act's prohibition against unilateral changes when those changes are not authorized by existing agreements. Thus, when a carrier asserts the right to make changes, which seem to present a genuine question of contract interpretation, and where irrevocable injury will not be done by immediate implementation of the changes, the district court might stay proceedings to enjoin the particular changes proposed pending the decision of the adjustment board. See *Order of Ry. Conductors* v. *Pitney*, 326 U.S. 561, 566–567. On the other hand, where changes are proposed which do not appear to be legitimate under existing agreements, the proper procedure would be for the district court to maintain the *status quo* pending the determination of the adjustment board. The decision of the adjustment board, when rendered, would be subject to limited judicial review as specified in Section 3, First (p) of the Act (45 U.S.C. 153, First (p)).

deviations from existing collective bargaining agreements in strike conditions. Such an exception is asserted in this case for the first time and it is wholly unnecessary to vindicate a carrier's legitimate interests, which may be met within the framework of the Act as it is written. In light of the unsettling effect such an open-ended exception would potentially have upon the orderly administration of the fundamental requirement of the Act that disputes be settled, wherever possible, through peaceful joint negotiation, such an exception should not now be established for the first time. Indeed, a "reasonable necessary" exception would be especially inappropriate in this case, where the carrier's demands were not limited in any respect to "reasonably necessary" changes, but in fact asserted the total suspension of all existing agreements during the strike. For these reasons, the court of appeals' judgment should be affirmed insofar as it requires FEC to abide by its existing agreements during the course of a lawful strike, and should be reversed insofar as it permits "reasonably necessary" deviations from those agreements.

III

THE UNITED STATES HAS STANDING TO MAINTAIN AN ACTION TO ENJOIN VIOLATIONS OF THE RAILWAY LABOR ACT

The issue of the standing of the United States arises in this case because the action was originally commenced against FEC by the United States (R. 13–

16) and because the court of appeals treated the United States as the sole plaintiff in considering the appeal. The non-operating unions, however, were granted leave to intervene as additional plaintiffs in the district court, and they are petitioners in this Court (No. 750, O.T., 1965).

The unions did not file a separate notice of appeal in the court of appeals. Both FEC and the United States, however, filed cross-appeals which placed the entire judgment of the district court in issue (R. 225–226, 234). The unions, as plaintiffs below, were therefore parties to the court of appeals proceedings, and they participated fully in the litigation.

The court of appeals treated the issue of standing as necessary to its judgment, and the case was, in fact, originally instituted by the United States to vindicate its interest in securing enforcement of the Railway Labor Act in a situation where patent violations of the Act had posed a serious threat to commerce. It is clear that the United States does, in fact, have standing to take such action. For these reasons, we submit that the Court may appropriately resolve the question of standing in this case.

The present suit is a proceeding for the enforcement of Section 2, Seventh of the Railway Labor Act, prohibiting a carrier from making unilateral changes in existing wages, rules or working conditions without complying with the negotiation and mediation

procedures of the Act. Paragraph Tenth of that Section provides:

> The wilful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor * * *. *It shall be the duty of any United States attorney* to whom any duly designated representative of a carrier's employees may apply *to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section,* and for the punishment of all violations thereof * * * [emphasis added].

Such explicit authority in the United States to bring "all necessary proceedings" is not limited to criminal proceedings but also confers authority to seek injunctive relief. *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 491–492. See, also, *Sanitary District* v. *United States*, 266 U.S. 405, 408; *United States* v. *San Jacinto Tin Co.*, 25 U.S. 273.[36] This is especially true where the regulatory provision sought to be enforced relates directly to maintaining the free flow of commerce (see Section 2 of the Act, 45 U.S.C. 152) an area of direct governmental responsibility.

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[36] Section 2, Tenth, was added to the Railway Labor Act in 1934. Commissioner Eastman, Federal Coordinator of Transportation, testified with regard to this provision, as follows: "* * * if any of the employees—and they are the ones vitally

The United States also has authority in this case to take proceedings to protect the jurisdiction of the National Mediation Board, which FEC has substantially frustrated through its refusal to submit to the statutory negotiation and mediation procedures which the Board supervises. "The United States may lawfully maintain suits in its own courts to prevent interference with the means it adopts to exercise its power of government and to carry into effect its policies." *United States* v. *Fitzgerald*, 201 Fed. 295, 296 (C.A. 8). See also, *United States* v. *American Bell Tel. Co.*, 128 U.S. 315, 367–368 (suit to protect integrity of patent

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interested in violations by carriers of these provisions—think that they are being violated they can present their claims without delay to the district attorney. He is required to take "all necessary proceedings for the enforcement of the provisions." If he finds that there is nothing in the case I assume he would not have to prosecute, but it places the enforcement of the provisions of this act directly with the Department of Justice and that is where I think that should be placed."

Hearings before House Committee on Interstate and Foreign Commerce on H.R. 7650, 73d Cong., 2d Sess. (1934), p. 54. See, also, *ibid.*, p. 28.

Moreover, in the discussion of Section 2, Tenth, during the House Hearings, *id.* at 55, 64–65, Section 3 of the Elkins Act (32 Stat. 847, 49 U.S.C. 43) was suggested as a precedent. That provision specifically authorizes the United States Attorneys, under the direction of the Attorney General, to bring civil injunction suits.

The suits the government instituted in this dispute against FEC and its unions to enforce the *status quo* (See also *United States* v. *Florida East Coast Ry. Co., et al.*, 221 F. Supp. 325 (D.D.C.); *United States* v. *Florida East Coast Ry. Co., et al.*, 55 LRRM 2802 (M.D. Fla.)), are the first actions, either civil or criminal, brought by the United States under the Railway Labor Act. Thus, there are no prior relevant interpretations of Section 2, Tenth.

system); *United States* v. *Feaster*, 330 F. 2d 671 (C.A. 5) (suit to enforce National Mediation Board's right to access to records needed to carry out its duties under Interstate Commerce Act); *United States* v. *Arlington County, Virginia*, 326 F. 2d 929 (C.A. 4) (suit to restrain collection of local tax which would contravene policies of the Soldiers' and Sailors' Relief Act of 1940).[37]

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[37] The court of appeals in this case rested the standing of the United States upon the "substantial threat to the free flow of commerce" coerced by FEC's sweeping unilateral actions (348 F. 2d at 685). See *In re Debs*, 158 U.S. 564, 582–586; *United States* v. *City of Jackson, Mississippi*, 318 F. 2d 1 (C.A. 5), rehearing denied, 320 F. 2d 870; *United States* v. *Lassiter*, 203 F. Supp. 20 (W.D. La.) (alternate holding), affirmed, 371 U.S. 10; *United States* v. *U.S. Klans, Knights of Ku Klux Klan*, 194 F. Supp. 897 (M.D. Ala.). While we believe that FEC's conduct clearly contained that threat—and, indeed, that this dispute, which has interrupted commerce or railroad routes serving vital defense installations at Cape Kennedy and Merritt Island, Florida, has in fact been prolonged by FEC's unlawful conduct—the explicit provisions of the Railway Labor Act conferring standing upon the United States make it unnecessary, in our view, to consider this basis.

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be (1) affirmed insofar as it enjoins FEC from making unilateral changes in the rates of pay, rules and working conditions in its existing agreements prior to the completion of the statutory mediation process, and (2) reversed insofar as it permits the making of such "reasonably necessary" unilateral changes prior to the termination of the statutory procedures.

Respectfully submitted.

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MARCH 1966.

APPENDIX

The Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. 151, *et seq.*, provides:

* * * * * * *

45 U.S.C. 151a. GENERAL PURPOSES.

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

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45 U.S.C. 152. GENERAL DUTIES.

First. Duty of carriers and employees to settle disputes.

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives.

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

* * * * *

Seventh. Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden.

No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

* * * * *

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections.

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. * * *

Tenth. Violations; prosecution and penalties.

The wilful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided,* That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Eleventh. Union security agreements; check-off.

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this

chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

* * * * *

45 U.S.C. 153. NATIONAL RAILROAD ADJUSTMENT BOARD.

First. Establishment; composition; powers and duties; divisions; hearings and awards.

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of whom shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 152 of this title.

* * * * *

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

* * * * *

(*l*) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

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45 U.S.C. 155. FUNCTIONS OF MEDIATION BOARD.

First. Disputes within jurisdiction of Mediation Board.

The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

Second. Interpretation of agreement.

In any case in which a controversy arises over the meaning or the application of any agreement reached through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

* * * * *

45 U.S.C. 156. PROCEDURE IN CHANGING RATES OF PAY, RULES, AND WORKING CONDITIONS.

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

* * * * *

45 U.S.C. 160. EMERGENCY BOARD.

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be allowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute rose.

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